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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON SHANE NEUHAUS,

Defendant and Appellant.

A151546

(Contra Costa County
Super. Ct. No. 5-151044-5)

Defendant appeals his conviction of some 42 offenses, resulting in a sentence of more than 266 years in prison, based on the jury's finding that by attempting to ignite an improvised explosive device, defendant attempted to kill 10 police officers who were trying to forcibly enter his home following a domestic violence incident. On appeal, he contends: (1) there is insufficient evidence to support the jury's finding that he had the specific intent to kill all 10 officers; (2) the court erred in instructing the jury on the "kill zone" theory of liability for attempted murder; (3) the prosecutor made prejudicial misstatements as to the kill zone theory in her closing argument; and (4) there is insufficient evidence that he used a "destructive device" or "explosive" within the meaning of Penal Code¹ section 18745. He also contends his conviction for assault by means of force likely to produce great bodily injury, which was related to the domestic violence incident, must be reversed because the court failed to instruct on the lesser

¹ All statutory references are to the Penal Code unless otherwise noted.

included offense of simple assault. Finally, he contends that remand is necessary so that the trial court can exercise its newly afforded discretion to strike the 10 firearm enhancements imposed under section 12022.53.

We agree that defendant's conviction for assault by means of force likely to produce great bodily injury must be reversed and that defendant is entitled to a limited remand to allow the trial court to exercise its discretion as to whether to strike the firearm enhancements. We reject defendant's remaining arguments and affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was convicted by a jury of 42 offenses: one count of infliction of corporal injury (§ 273.5, subd. (a)); one count of misdemeanor battery on a cohabitant (§ 243, subd. (e)(1)); one count of first degree burglary with a person present in the residence (§§ 459, 460, subd. (a), 667.5, subd. (c)(21)); one count of attempted kidnapping (§§ 664, 207, subd. (a)); one count of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)); two counts of felony vandalism (§ 594, subd. (a)); one count of attempted voluntary manslaughter (§§ 664, 192, subd. (a)); one count of premeditated attempted murder (§§ 664, 187, subd. (a)); 10 counts of premeditated attempted murder of a peace officer (§§ 664, 187, subd. (a)); two counts of assault with a deadly weapon (§ 245, subd. (a)(1)); one count of attempted explosion of a destructive device with the intent to commit murder (§§ 664, 187.45); 10 counts of assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)); and 10 counts of resisting a police officer (§ 69). The jury also found true the enhancement allegations, alleged with respect to certain counts, that defendant personally inflicted great bodily injury during the commission of the offense (§ 12022.7, subd. (a)) personally used a deadly weapon other than a firearm (§ 12022, subd. (b)(1)), personally used and discharged a firearm (§ 12022.53, subd. (b)), and personally used a firearm (§ 12022.5, subd. (a)).

The following evidence was presented at trial:

On the morning of October 10, 2014, defendant physically assaulted his long-term live-in girlfriend Diane. After Diane escaped, she stayed with her sister and brother-in-law for a few days. On October 14, 2014, defendant appeared at Diane's sister's house and again physically assaulted Diane. Diane's brother-in-law was injured when he attempted to intervene in the assault. Diane's sister was seriously injured when defendant chased her with his car and then rammed his car against the front of her home. The police arrived after defendant had driven away.

While the police were still there, defendant's mother left Diane a voicemail message. In the message, defendant's mother said defendant had called her and told her that he had driven through the house, was wanted for kidnapping, was going to commit suicide, was going to blow himself up, and that he had propane tanks at his residence. The Special Weapons And Tactics Team (SWAT) responded to defendant's home. They were informed that in addition to the propane tanks, defendant had access to pistols and possibly a rifle.

Officers set up a perimeter around the residence and evacuated the neighbors due to the risk of an explosion. The SWAT team arrived in their uniforms and with an armored truck and an old bus that was used as a command center and illuminated the area with spotlights.

Ten members of the SWAT team approached the house and attempted to enter the front door. The officer assigned to breach the door was positioned in front of the door with a sledgehammer. The rest of the entry team was lined up on each side of him, between three and fifteen feet from the door. As the first officer began hitting the door, some of the officers heard four or five popping sounds, like gunfire, coming from inside the house. Others reported hearing the sounds of something pinging metal-on-metal. This caused the officers to back away from the house.

On their next attempt, the SWAT team broke open the front door. Inside, they saw a propane tank with ammunition on top of the tank. On the far side of the family room, there were several blankets piled up and an open umbrella that appeared to be a sniper

loft or shooting blind. The SWAT team retreated for officer safety and sent in a robot with cameras.

Throughout the standoff, a police negotiator was communicating with defendant. The negotiator made repeated calls to defendant. Each time defendant would answer, talk, and then hang up. The negotiator called back each time a few minutes later. Defendant was angry, swearing, and yelling insults. Defendant repeatedly expressed his distrust of the police and said multiple times he was not going to live through this scenario, and that the police only wanted to see him die. According to the negotiator, defendant said that “he planned on going out and taking us with him.” Defendant’s exact words were, “You’re all fucked up and that’s why you all need to die with me.” When asked about the propane tank near the front door, defendant said the propane was there so that “he could go up in a ball of flame[s].” When the officer asked whether defendant had altered the cans so that they would explode, defendant replied “sure” but refused to give the negotiator any additional details.

After several hours, defendant agreed to exit the house and was taken into custody. When officers searched his house they found that the propane tank near the front door had a plastic bag containing 125 bullets on top of it. They found several other improvised explosive devices throughout the house, including other propane tanks with bullets taped to the top. There were two distinct dimples in the propane tank located near the front door that appeared to have been caused by bullets striking the tank. There also appeared to be remnants of bullets near this tank. A partially loaded .45 caliber magazine was found on the floor near the sniper blind.

The prosecution’s expert in fire and arson investigations opined that if someone were to shoot at a seven-gallon propane tank that had live ammunition on it, it was possible to cause a fire or explosion large enough to injure or kill people in the area. A member of the bomb squad, who also testified as an expert, explained how a propane tank with ammunition on its top could cause an explosion: If a bullet penetrated the tank and caused propane to leak out, a second bullet strike or a gun muzzle flash could

potentially ignite the leaked propane and cause the area to catch fire and possibly explode in different directions. He opined that had the propane been ignited in this instance, the exterior wall could have exploded or come apart from the rest of the structure. If there were people within 10 to 15 feet of the wall, an exterior wall could have blown off and injured them.

Defendant denied assaulting Diane or her family members. He claimed he had not tried to hit anyone with his car and that Diane's sister dove in front of his truck, causing him to slam on his brakes and hit the post in front of the house with his driver's side mirror. He panicked and tried to back up, but instead accidentally drove forward into the house. On his way home, he realized that he would likely be going to jail for the rest of his life. He called his mom and told her he was likely going to commit suicide. He knew that the police would be coming and he needed time to gather the courage to commit suicide, so he barricaded the house. He also placed the propane tanks inside the residence to buy himself more time to convince himself to commit suicide. He believed if the police saw the propane tanks, they would back off and give him more time to do so. He denied putting ammunition on top of the tanks. He admitted that he heard the police beating on the front door and that he shot about three times into the front room but he denied that he was intentionally shooting at the propane tank. When asked on cross-examination what he meant by his statements to the police negotiator, defendant testified, "I suppose I meant that if I die, it wouldn't hurt to take bad cops with me."

Defendant was sentenced to an aggregate term of 266 years 4 months to life in prison. Defendant timely filed his notice of appeal.

DISCUSSION

I. Attempted Murder of a Peace Officer

A. Substantial evidence supports defendant's convictions.

Attempted murder requires proof of " ' "the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." ' ' " (*People v. Perez* (2010) 50 Cal.4th 222, 229.) Here, the prosecution argued that when

defendant fired his gun into the propane tank located near the front door of his home, he committed an attempted murder of each of the 10 police officers who were attempting to enter the residence. Defendant does not dispute that there is substantial evidence to support the jury's finding that he shot at the propane tank and thus, attempted to cause an explosion. He argues that there is no substantial evidence to support the finding that he did so with the specific intent that the explosion kill all 10 officers.

“ ‘ “The mental state required for attempted murder has long differed from that required for murder itself. Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices. [Citation.]” [Citation.] In contrast, “[a]ttempted murder requires the specific intent to kill.” ’ ” (*People v. Perez, supra*, 50 Cal.4th at p. 229.) “ ‘ “[G]uilt of attempted murder must be judged separately as to each alleged victim.” ’ ” (*Id.* at p. 230.) Thus, in order for defendant to be convicted of the attempted murder of each of the ten officers standing outside his door, the prosecution was required to prove he acted with the specific intent to kill each officer. (*Ibid.*)

Whether a defendant possesses the requisite intent to kill must be derived from all the circumstance, including the defendant's actions and words. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) A specific intent to kill can also be proven where the evidence establishes that the defendant “used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the ‘kill zone’) as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm.” (*People v. Smith* (2005) 37 Cal.4th 733, 746; *People v. Perez, supra*, 50 Cal.4th at p. 232 [Examples of such circumstances include “using an explosive device with intent to kill everyone in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill everyone fired upon.”].) “The kill zone theory consequently does not operate as an exception to the mental state requirement for attempted murder or as a means of somehow bypassing that requirement. In a kill zone case, the defendant does

not merely subject everyone in the kill zone to lethal risk. Rather, the defendant *specifically intends* that *everyone* in the kill zone die. If some of those individuals manage to survive the attack, then the defendant—having specifically intended to kill every single one of them and having committed a direct but ineffectual act toward accomplishing that result—can be convicted of their attempted murder.” (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798.)

Here, defendant told the police negotiator that he intended to blow up the house, killing himself and all of the police officers. He then attempted to ignite the explosive device by shooting at the propane tank five times. Nonetheless, defendant contends that the “expert testimony established only that an explosion was possible” and that, if an explosion had occurred, it was possible the officers would have been injured rather than killed. He suggests that “any loss of life in this case was extraordinarily speculative.” However, the prosecutor was not required to prove that the explosive device necessarily would have killed all 10 officers had it exploded. “ ‘[W]hen commission of the substantive offense is factually impossible, a defendant may be convicted of an attempt to commit the offense when it is proven that he had the specific intent to commit the offense and did those acts he believed necessary to consummate it but failed to commit the statutory offense because, unknown to the actor, one or more of the essential elements of the offense were lacking.’ [Citation.] Thus, a defendant may be convicted of an attempt to commit a crime where there is sufficient evidence to demonstrate that the means used by the defendant, together with the surrounding circumstances, made the intended crime *apparently possible*. ‘ “If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are in fact unsuitable, or because of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim, or by a third person.” ’ ” (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1383-1384 [upholding conviction for attempting to encourage another person to commit suicide where defendant helped the victim obtain 100 pills which,

unknown to either defendant or the victim, would not have been lethal]; see also *People v. Siu* (1954) 126 Cal.App.2d 41, 43-44 [upholding conviction for attempted possession of narcotics, where defendant was in possession of white talcum powder he believed was heroin].) Here, the experts testified that the device had the potential to explode, which in turn could cause the building to collapse and could turn the bullets taped to the top of the tank into shrapnel. While death was not guaranteed in an explosion, the device had the apparent ability to kill the officers attempting to enter the front door. This evidence coupled with defendant's statements establish an intent to use what he believed to be lethal force to kill all of the officers.

Nothing in the record suggests that defendant intended to kill only the officer closest to his front door. That defendant did not know exactly how many officers were outside his door does not preclude a finding that he intended to kill every one of them. (See *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564 [“The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. [Citation.] . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed.”].) Finally, the fact that defendant apparently fired too quickly to successfully ignite the device does not suggest that defendant did not intend for it to explode when he fired the gun. Accordingly, substantial evidence supports defendant's attempted murder convictions.

B. The court's erroneous “kill zone” instruction was not prejudicial.

The jury was instructed on the elements of attempted murder in relevant part as follows: “To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffectual step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] A direct step requires more than merely planning or preparing to commit murder or obtaining or

arranging for something needed to commit murder. A direct step is one that goes beyond planning or preparation and shows that a person is putting his or her plan into action. A direct step indicates a definite and unambiguous intent to kill. It is direct movement toward the commission of the crime after preparations are made. It is an immediate step that puts the plan in motion so that the plan would have been completed if some circumstance outside the plan had not interrupted the attempt.”

With respect to the kill zone theory of liability, there was an obvious apparently inadvertent omission in the CALCRIM instruction, both as written and as read to the jury. The jury was instructed that “A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or ‘kill zone.’ [¶] In order to convict the defendant of the attempted murder of Paul Vandiver, Michael Roberts, Carl Cruz, Bradley Giacobazzi [*sic*], Greg Pardella, David Espinosa, Matthew Forristall, Timothy Elsberry, Blake Roberts, and Lyle Robles, or intended to kill Michael Roberts, Carl Cruz, Bradley Giacobazzi [*sic*], Greg Paredella [*sic*], David Espinosa, Matthew Forristall, Timothy Elsberry, Blake Roberts, and Lyle Robles or intended to kill Paul Vandiver by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Paul Vandiver, Michael Roberts, Carl Cruz, Bradley Giacobazzi, Greg Pardella, David Espinosa, Matthew Forristall, Timothy Elsberry, Blake Roberts, and Lyle Robles.”

The second paragraph of the kill zone instruction, CALCRIM No. 600, reads as follows: “A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or ‘kill zone.’ In order to convict the defendant of the attempted murder of _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>*, the People must prove that the defendant not only intended to kill _____ *<insert name of primary target alleged>* but also either intended to kill _____ *<insert name or description of victim charged in attempted murder count[s] on concurrent intent theory>*, or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the

defendant intended to kill _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>, or _____ <insert name of primary target alleged> by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of _____ <insert name or description of victim charged in attempted murder count[s] on concurrent-intent theory>.” While defendant is correct that the omitted language rendered the instruction nonsensical, the error was not prejudicial.

As defendant acknowledges, an instruction on the kill zone theory is not required. (*People v. Bland* (2002) 28 Cal.4th 313, 331, fn. 6.) “[O]rdinary instructions on attempted murder . . . provide all the necessary legal tools” to permit the jury to draw the inference that the means of killing employed by the defendant supports the conclusion that the defendant specifically intended to kill every person in the area. (*People v. McCloud*, *supra*, 211 Cal.App.4th at p. 803.) Moreover, the first paragraph of the kill zone instruction properly informed the jury that “[a] person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or ‘kill zone.’ ” As the Attorney General states, “No element of the crime was eliminated. Nor was the burden of proof lowered. The instruction required the jury make all the necessary findings to support each charge of attempted murder.” Moreover, the verdict forms finding defendant guilty of the attempted murder of each officer found true that “[t]he attempted murder was willful, deliberate, and premeditated.” There is no reasonable likelihood that the jury was confused or misled by the instruction given or that a proper instruction would have resulted in a more favorable outcome for defendant.

C. Any misstatements in the prosecutor’s closing argument regarding the kill zone theory were not prejudicial.

In her closing argument, the prosecutor correctly and completely laid out the relevant legal principles relating to attempted murder, including that the “act of a person who intends to kill another person will constitute attempt where those acts clearly indicate a certain unambiguous intent to kill.” With respect to the counts relating to the ignition of a destructive device with the intent to commit murder, the prosecutor argued,

“So this is where we have to look into the defendant’s mind, his intent. What was he doing? What was his intent by trying to explode the propane tanks? Well, that’s what a bomb is. A bomb is designed to kill people. It’s designed to explode. It has no other purpose than to destroy.” She added, “*He was trying to explode that propane tank and cause those officers on the other side to either be killed or injured seriously. That was his intent*, to blow up the propane tank, which is why he shot at it five times. We have five spent shell casings. It didn’t work the way he planned it, but that doesn’t mean he didn’t try. It wasn’t for lack of trying. It just means he sucks at making a bomb.” (Italics added.)

With respect to the specific counts relating to the attempted murder of the officers, she argued, “So in order to prove attempted murder, it’s the same elements as before, with the other attempted murder on Diane and [her sister]. It’s the same count, same element, in that he took at least one direct step and, in this case, this would be him trying to blow up the . . . explosive device at the door — toward killing another human being, the officers on the other side of the door, and that he had the intent to kill. [¶] We just talked about his intent to kill in the last count. It’s the same intent that’s required for attempted murder, and this is the same element[] as before. *The difference with this is that there is an instruction, CALCRIM 600, that says a person who primarily intends to kill one person -- which would be the breacher, the person at the door, that that intent transfers to everybody else in that area.* [¶] *So when you intend -- you are not aiming at a person, you are just going to blow up an area, and whoever is in that area is going to be hurt, and that’s what -- he didn’t care.* It didn’t matter to him. It could have been two officers. It could have been ten. It could have been twenty. It didn’t matter to him. He just wanted to blow it up. [¶] And he told you, I just was going to take as many bad cops with me as I could. He didn’t know those police officers. He had never seen them before. But he thinks they are all bad because he has had a hatred of cops since he was three, because he had a bad experience with his father. And so he grew up with a hatred of cops. And he said, I was going to take as many bad cops with me as I could because he considers all cops bad. [¶] And so his intent is concurrent with that person at the door, because he has

that bomb at the door; so whoever is at the door, he wants to take them out and everybody else in the kill zone. [¶] . . . [¶] *So if this bomb had worked the way he intended it to work, why would we not assume that there is going to be some fragments, shrapnel, glass, plaster, wall, that would explode in this area and injure or kill these officers. That was what his intention was.* [¶] So he intended to – whoever is at this door, he wants to explode this bomb and everybody else in the kill zone.” (Italics added.) Subsequently, during the rebuttal portion of her closing argument, the prosecutor additionally argued, “there ain’t no doubt about it, he intended — he told you up there, if I was going to go, I was going to take some bad cops with me. . . . [H]e said that on the stand, but now he wants you to think he wasn’t trying to kill them. How was [he] going to take them with you? What were you trying to do?” She then explained how she chose to charge defendant with 10 attempted murders: “*We charge the people that are immediately in danger, at the door, that are immediately in the zone of danger*, as he is trying to explode that propane tank. Those are the ten officers that we charged. *We don’t charge them at the [other location] because they are not in that zone of danger.* That’s fifteen to twenty feet at the door.” (Italics added.)

Defendant contends the italicized portions of the prosecutor’s closing argument were incorrect or misleading.² Taken as a whole, however, we find no prejudicial error in the prosecutor’s argument. The jury was clearly instructed that it was required to find a specific intent to kill for each officer and that a person may specifically intend “to kill everyone in a particular zone of harm or ‘kill zone.’ ” It was also instructed that if the prosecutor’s comments on the law conflict with the instructions given by the court, the jury should disregard the comment and follow the court’s instructions. Although the prosecutor’s argument most often referred to an intent only to kill, her several references

² Defendant concedes that no objection was made in the trial court but argues that the issue should nevertheless be decided on its merits because defendant received ineffective assistance of counsel due to defense counsel’s failure to properly object. In the interest of efficiency, we review and reject defendant’s argument as discussed below.

to “kill or injure” were misleading and should not have been made. However, those references conflicted with the overall tenor of her argument and, more importantly, with the court’s instructions. We presume the jury followed the instructions, not the prosecutor’s misstatements.

The prosecutor’s comment that defendant “didn’t care” how many officers he killed in the blast cannot reasonably be understood as saying that the jury need not find specific intent to kill each victim. The prosecutor emphasized that defendant’s intent was to explode a bomb that would kill everyone in the blast zone. While the prosecutor’s reference to transferred intent in discussing CALCRIM No. 600 was potentially misleading, there is no likelihood the jury concluded that if it found that defendant intended to kill one officer, that intent transferred to the other officers. The jury was not given an instruction on transferred intent. To the contrary, the jury was instructed to find a specific intent to kill as to each victim. Finally, the prosecution’s reference to a “zone of danger” does not suggest, as defendant argues, that implied malice is sufficient to convict defendant of attempted murder. The prosecutor was clearly delineating the geographic area in which the bomb blast could be considered lethal. Defendant could not reasonably have intended to kill officers more than 15 to 20 feet from the building. In short, we find no prejudicial error in the prosecutor’s closing argument.

II. Attempted Ignition of an Explosive or Destructive Device

Defendant was convicted in count 12 of attempting to explode or ignite a destructive device or explosive in violation of section 18745.³ The jury was instructed that a “destructive device includes any breakable container (propane tank) that contains a flammable liquid (propane gas) with a flashpoint of 150 degrees Fahrenheit or less and

³ Section 18745 provides: “Every person who explodes, ignites, or attempts to explode or ignite any destructive device or any explosive with intent to commit murder is guilty of a felony, and shall be punished by imprisonment in the state prison for life with the possibility of parole.”

has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.”⁴

In closing arguments, the prosecutor argued that the propane tank, as configured by defendant, constituted a destructive device under this definition. She explained, “the instruction talks about an IED is something that’s capable of being exploded. The defense would likely argue that . . . this was a propane tank. It didn’t have a wick. It didn’t have a way to ignite. [¶] But I want to remind you, [the expert] testified that if one of those bullets had ruptured that tank, the gas will come out, and the muzzle of a second shot would be enough to ignite that gas. That is the ignition source of the propane tank.”

Defendant contends the prosecution presented insufficient evidence the propane tank with the ammunition on top qualified as a destructive device under the definition given the jury. He argues, “First, propane is a flammable gas, not a flammable liquid. (See, e.g., U.S Department of Transportation, Hazardous Materials Training, p. 5, <<https://www.fs.fed.us/t-d/fueltran/training/genawaretrng.pdf>> [as of April 30, 2019].) Flammable liquids include gasoline, diesel, and torch fuel. (See *ibid.*) Second, contrary to the prosecutor’s argument, a propane tank does not have ‘a wick or similar device capable of being ignited,’ as is required by the statute.”

On appeal, the Attorney General concedes that there was no testimony that the device constructed by defendant “had the requisite characteristics as described in subdivision (5) of Penal Code section 16460.” The Attorney General argues, however, that the device constituted a “destructive device” under section 16460, subdivision (a)(2),

⁴ Section 16460, subdivision (a)(1) to (6) defines six alternatives that may constitute a destructive device. The definition given to the jury is based on section 16460, subdivision (a)(5) which defines a destructive device as “Any breakable container that contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.”

which defines a “destructive device” as a “bomb.”⁵ The Attorney General argues that there is substantial evidence that the propane tank, as configured, was a bomb. Conceding that the jury was not instructed on this theory, the Attorney General argues that if “the instructions were insufficient or in some manner defective, [defendant] has forfeited that claim as he failed to assert an objection to the instructions as given. Having failed to assert an objection at trial, [he] forfeits this issue on appeal.” Indeed, defense counsel did not simply fail to object; he specifically requested the jury be given the definition of a destructive device under section 16460, subdivision (a)(5). Alternatively, the Attorney General argues the instructional error was harmless: “The evidence before the jury was that the propane tank with bullets atop it and shots fired at it constituted an I.E.D., which required a finding that the device is capable of exploding. Last, the jury found true the special allegations attached to each of the attempted murder charges involving the officers, namely that appellant personally used a deadly weapon, to wit: an improvised explosive device.”

We agree that the instruction given defined a destructive device in a manner that did not correspond with the evidence, but the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Contrary to defendant’s argument, there is overwhelming evidence that defendant attempted to detonate a bomb. “No provision in the statutory scheme defines the term ‘bomb.’ . . . Everyone is assumed to ‘know what a bomb is.’ ” (*People v. Turnage* (2012) 55 Cal.4th 62, 71; see also *People v. Quinn* (1976) 57 Cal.App.3d 251, 257 [“[A] homemade, explosive-type bomb” meets the statutory definition of a destructive device.]; *People v. Dimitrov* (1995) 33 Cal.App.4th 18, 25 [Court properly instructed jury that “a pipe bomb is a destructive device.”].) A bomb is defined in the dictionary as “A container filled with explosive or incendiary material, designed to explode on impact or when detonated by a timing, proximity, or remote-control device.” (Oxford English Dict. <<https://en.oxforddictionaries.com>> [as of

⁵ Section 16460, subdivision (a)(2) reads in full “Any bomb, grenade, explosive missile, or similar device or any launching device therefor.”

April 30, 2019].) The prosecution’s expert testified that the propane tank device was an improvised explosive device, which he explained is “an assembly of components that aren’t designed or purposely made to be an explosive device that in combination could cause an explosion.” He agreed that the device could be considered a bomb. As noted by the Attorney General, the jury found true the allegations that defendant personally used an improvised explosive device. Accordingly, the jury necessarily found that defendant attempted to explode or ignite a destructive device within the meaning of section 18745.

III. Assault By Means of Force Likely to Produce Great Bodily Injury

Defendant was convicted of felony assault by means of force likely to produce great bodily injury upon Diane’s brother-in-law. This charge was based on the evidence that when the brother-in-law tried to physically intervene as defendant was struggling with Diane, defendant forcibly pushed him away causing the victim to fall and hit his head on the floor. Defendant contends the trial court erred in failing to instruct the jury on the lesser included offense of assault. As the Attorney General states, “The record makes clear that when counsel asked for said instruction, the court agreed an instruction was warranted, and the failure to provide it to the jury was an oversight.” The Attorney General asserts, however, that the error was not prejudicial.

“[T]he failure to instruct sua sponte on a lesser included offense in a noncapital case is, at most, an error of California law alone, and is thus subject only to state standards of reversibility. . . . [S]uch misdirection of the jury is not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome.” (*People v. Breverman* (1998) 19 Cal.4th 142, 165, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) In making that evaluation, we “consider, among other things, whether the evidence supporting the existing judgment is so *relatively* strong, and the evidence supporting a different outcome is so *comparatively* weak, that there is no reasonable probability the error of which the defendant complains affected the result.” (*Breverman, supra*, at p. 177.)

Here, the evidence established that defendant pushed the victim with force sufficient to cause him to fall to the ground. The victim testified that he was “tossed” about five to six feet and landed on his head. Contrary to the Attorney General’s characterization, there is no evidence that defendant “struck [the victim] multiple times to the point of unconsciousness.” Rather, the victim lost consciousness for five to six seconds after hitting his head on the ground. As defendant notes, the jury rejected the great bodily injury allegation attached to this count. On this record, we cannot say the a reasonable jury would not have convicted defendant of the lesser assault had it been properly instructed. Accordingly, we must reverse defendant’s conviction on count five.

IV. Sentence Enhancements for Personal Use of a Firearm

At his sentencing, each of defendant’s convictions for premeditated attempted murder of a peace officer were enhanced by a term of 10 years pursuant to section 12022.53, subdivision (b), for his personal use of a firearm. At that time, imposition of the enhancements was mandatory. This limitation on the court’s discretion was noted by the court.

On January 1, 2018, after sentencing in this case, Senate Bill No. 620 amended section 12022.53, subdivision (h) to read: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

Defendant requests and the Attorney General agrees that a limited remand is appropriate so that the trial court may exercise its discretion under section 12022.53, subdivision (h). (See *People v. Robbins* (2018) 19 Cal.App.5th 660, 679 [reversing sentence enhancement imposed under 12022.53, subdivision (d) and remanding for the trial court to the trial court may exercise its discretion under section 12022.53, subdivision (h)]; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [same].) Accordingly, we reverse the sentence terms imposed for defendant’s firearm enhancements. The trial court is directed to exercise its discretion under section

12022.53, subdivision (h). If the trial court elects not to strike or dismiss any of the enhancements, then the trial court is directed to resentence defendant for the firearm enhancement(s).

Disposition

Defendant's conviction in count 5 is reversed and the matter remanded with the instruction either to retry the charge or reduce the conviction to simple assault. The sentences imposed for the firearm enhancements in counts 13, 16, 19, 22, 25, 28, 31, 34, 37 and 40 (§ 12022.53, subd. (b)) are reversed and the matter is remanded with the instruction to the court to exercise its discretion to determine whether to strike the enhancements under section 12022.53, subdivision (h) and to re-enter judgment accordingly. The judgment is affirmed in all other respects.

POLLAK, P. J.

WE CONCUR:

STREETER, J.

BROWN, J.